
In the Matter of the Compensation of
TONY L. CLARK, Claimant
Own Motion No. 14-000700M
OWN MOTION ORDER REVIEWING CARRIER CLOSURE
George J Wall, Claimant Attorneys
Liberty Mutual Ins, Carrier

Reviewing Panel: Members Weddell and Johnson.

Claimant requests review of the August 22, 2014 Notice of Closure that: (1) awarded an additional 28 percent whole person impairment and 61 percent work disability; and (2) awarded temporary disability benefits from June 20, 2011 through February 25, 2012 for his “post-aggravation rights” new/omitted medical conditions (“chronic cervical myofascial pain disorder and drug rebound headaches”).¹ Claimant seeks an increased permanent disability award (whole person impairment and work disability) and additional temporary disability benefits. For the following reasons, we modify the closure notice.

FINDINGS OF FACT

On September 27, 2005, claimant, a tree faller, sustained a compensable injury. The insurer accepted a nasal bone fracture, maxillary bone fracture, and upper lip laceration. (Ex. 1).

On July 28, 2006, the insurer closed the claim without a permanent disability award. (Ex. 3). Claimant’s aggravation rights expired on July 28, 2011.

In October 2008, the insurer modified its acceptance to include posttraumatic tension headaches and a cervical strain. (Exs. 4, 5).

An October 21, 2010 Notice of Closure awarded 38 percent whole person impairment for claimant’s cervical and cranial nerve/brain conditions, and no work disability. (Ex. 6). A February 4, 2011 Order on Reconsideration reduced

¹ Claimant’s September 27, 2005 claim was accepted as a disabling claim and was first closed on July 28, 2006. Thus, claimant’s aggravation rights expired on July 28, 2011. Therefore, when claimant sought claim reopening in January 2012, the claim was within our Own Motion jurisdiction. ORS 656.278(1). On January 28, 2014, the insurer voluntarily reopened claimant’s Own Motion claim for a “post-aggravation rights” new/omitted medical condition (“chronic cervical myofascial pain disorder”). ORS 656.278(1)(b), (5). On June 4, 2014, the insurer also voluntarily reopened claimant’s Own Motion claim for a “post-aggravation rights” new/omitted medical condition (“drug rebound headaches”). *Id.* On August 22, 2014, the insurer issued its Notice of Closure.

claimant's whole person impairment award to 13 percent for the cervical and cranial nerve/brain conditions. (Ex. 7). In September 2011, an Administrative Law Judge (ALJ) affirmed the reconsideration order. (Ex. 48).

On June 20, 2011, claimant returned to Dr. Samuels, his attending physician, for treatment of neck pain and headache. (Ex. 9-2). Dr. Samuels released him to modified work for a projected period of "3-6 months;" *i.e.*, claimant's anticipated medically stationary date. (Exs. 9-1, 221-2).

On August 15, 2011, referring to his July 29 and August 15, 2011 chart notes, Dr. Samuels submitted an 827 form, releasing claimant from work for a projected period of "3-6 months;" his anticipated medically stationary date. (Exs. 33-1, 221-2).

On March 13, 2012, the insurer denied claimant's new/omitted medical condition claim for chronic cervical myofascial pain. (Ex. 92). Claimant requested a hearing.²

On March 28, 2012, Dr. Samuels noted that claimant had chronic headaches from his head injury years ago, with superimposed "analgesic rebound." (Ex. 96-1). He stated that claimant was disabled from working "in the woods," and "we reassess that status every 3-6 months." (*Id.*)

On May 9, 2012, claimant returned to Dr. Samuels for treatment of severe headaches. (Ex. 100-1). Dr. Samuels repeated that claimant was disabled from working "in the woods," and "we reassess that status every 3-6 months." (*Id.*)

On May 14, 2012, the insurer accepted claimant's new/omitted medical condition claim for "drug rebound headaches." (Ex. 102).

In June and July 2012, Dr. Samuels reasoned that claimant's headaches did not include an element of "analgesic rebound." He explained that, although that previously appeared to be the case, claimant's headaches had continued after the medicine with which they were concerned was discontinued. On that basis, Dr. Samuels opined that medications were not the cause of claimant's headache and neck pain. (Exs. 104-1, 111, 112-1).

² The insurer also denied claimant's claim for a "worsening" of his previously accepted conditions, as well as his new/omitted medical condition claim for "chronic somatoform pain disorder." (Exs. 69, 76, 101). Claimant requested a hearing challenging those denials, which were consolidated. (Exs. 70, 77, 103).

On January 10, 2013, an ALJ set aside the insurer's denial of the "chronic cervical myofascial pain disorder." (Ex. 135).³ On February 8, 2013, the insurer modified its acceptance to include the aforementioned condition. (Ex. 140).

On January 28, 2013, claimant sought treatment for neck pain and headaches. (Ex. 138). Dr. Samuels noted that claimant was not able to look up or work more than a couple of hours before his headaches were disabling. (Ex. 138-1). He stated that claimant was not able to work. (Ex. 138-2). On February 25, 2013, Dr. Samuels noted that claimant was still not able to work. (Ex. 142-1).

On March 20, 2013, in response to an inquiry from claimant's attorney as to whether he had authorized temporary total disability on August 15, 2011, Dr. Samuels stated: "I'm not sure. I can't find any record of [a] Form 827 from that day." (Ex. 145-1). In addition, Dr. Samuels agreed that from August 15, 2011 forward claimant "required curative treatment." (*Id.*) He added: "But hasn't found anything curative." (*Id.*)

On March 27, 2013, claimant sought treatment for neck pain and headaches. (Ex. 146). Dr. Samuels stated "no change to work status (still unable to do logging activities due to headaches and neck pain)." (Ex. 146-2).

On August 27, 2013, Dr. Samuels opined that "[e]very single visit for [claimant] regarding head and neck pain stems from the same basic set of diagnoses, which is cervical myofascial pain disorder, which started after he had a facial fracture from a logging accident." (Ex. 173-1).

On January 28, 2014, the insurer voluntarily reopened claimant's Own Motion claim for the "post-aggravation rights" new/omitted medical condition ("chronic cervical myofascial pain disorder"). (Ex. 198). On January 31, 2014, claimant requested Own Motion relief seeking temporary disability benefits related to that reopened claim. (Ex. 199).

On February 24, 2014, claimant returned to Dr. Samuels, who noted that the chronic problem being treated was "[m]yofascial pain syndrome, cervical." (Ex. 204-1). He also stated that claimant "is not able to work as a tree faller due to medical complications from a work related injury in 2005." (Ex. 204-2).

³ The remainder of the denials were upheld. (Ex. 135).

On April 7, 2014, Dr. Samuels declared claimant's conditions to be medically stationary, and recommended a permanent disability rating. (Ex. 214).

On April 8, 2014, Dr. Denekas, who examined claimant at the insurer's request, found the following cervical ranges of motion (ROM): 20 degrees flexion; 20 degrees extension; 20 degrees right lateral flexion; 20 degrees left lateral flexion; 34 degrees right rotation; and 28 degrees left rotation. (Ex. 215-23). He considered the findings to be valid for the purposes of rating permanent impairment. (Ex. 215-25). Dr. Denekas apportioned 40 percent of the ROM findings to preexisting cervical degenerative disc disease, and the remaining 60 percent to the accepted conditions. (Ex. 215-26). Dr. Denekas also stated that claimant was significantly limited in the repetitive use of his neck due to the accepted conditions. (*Id.*) Dr. Samuels concurred with Dr. Denekas's report. (Ex. 231).

On May 7, 2014, Dr. Samuels responded to questions regarding the effect of claimant's diagnoses including "Chronic Cervical and Myofascial Pain Disorder, migraine headaches, and sensitivity to light and sound," as well as chronic neck and head pain, on his ability to sustain regular employment. (Ex. 218-1). Dr. Samuels indicated that claimant may not be able to return to work, and he was not able to perform any "tree/forestry/logging work." (Ex. 218-1, -2).

On May 8, 2014, we issued an Own Motion Order pertaining to claimant's entitlement to temporary disability benefits on his reopened "post-aggravation rights" new/omitted medical condition claim ("chronic cervical myofascial pain disorder"). We found that claimant was entitled to temporary disability benefits from June 20, 2011 through February 15, 2012. We also directed the insurer to reopen claimant's Own Motion claim for the "post-aggravation rights" new/omitted medical condition ("drug rebound headaches"). (Ex. 221). *Tony L. Clark*, 66 Van Natta 821 (2014).

On May 27, 2014, claimant sought reconsideration of our Own Motion Order and submitted a May 21, 2014 supplemental report from Dr. Samuels, asserting that he was entitled to temporary disability benefits from June 20, 2011 through April 7, 2014. (Exs. 223, 225). In our June 3, 2014 Own Motion Order on Reconsideration, we declined to consider the supplemental report, and adhered to our previous order awarding temporary disability benefits from June 20, 2011 through February 15, 2012. (Ex. 227). *Tony L. Clark, recons*, 66 Van Natta 1037 (2014).

On June 4, 2014, the insurer voluntarily reopened claimant's Own Motion claim for the accepted "drug rebound headaches" condition.

In a July 6, 2014 supplemental report, Dr. Denekas was provided with the definition of "arthritis" and "arthritic condition," and agreed that claimant's preexisting cervical degenerative disc disease met the criteria set forth for an arthritic condition. (Ex. 238-1). He opined that claimant had Class 2 cranial nerve/brain impairment related to his accepted headache conditions. (Ex. 238-2). Dr. Denekas further stated that claimant was not able to return to his regular work as a timber faller due to the lack of range of motion in his neck, but otherwise had no other limitations. (*Id.*) Dr. Samuels concurred with Dr. Denekas's report. (Ex. 245).

An August 22, 2014 Notice of Closure awarded temporary disability benefits from June 20, 2011 through February 25, 2012. (Ex. 251-1). The closure notice awarded an additional 28 percent whole person impairment, which was based on Dr. Denekas's apportioned cervical ROM findings, a "chronic condition" limitation for the cervical spine, and a Class 2 cranial nerve/brain impairment. (Ex. 251-2). This resulted in a 41 percent whole person impairment award to date. The Notice of Closure also awarded a 61 percent "work disability" award, based on a social-vocational value of 20 percent. (*Id.*) The social-vocational value was based on an adaptability factor of 5 using the adaptability scale for 41 percent whole person impairment. (*Id.*)

In a September 24, 2014 physical capacity report, Dr. Samuels stated that claimant was capable of standing for less than two hours in an 8-hour day, and that he would need to alternate positions after 30 minutes. (Ex. 258-1-2). He also indicated that claimant could occasionally climb, and could not crawl. (Ex. 258-3). Dr. Samuels opined that claimant could occasionally lift up to 20 pounds, and frequently lift up to 10 pounds. (*Id.*)

Claimant requested review of the August 2014 Own Motion Notice of Closure, seeking additional whole person impairment and work disability awards. He also argued that he was entitled to temporary disability benefits from February 15, 2012 through April 7, 2014.

CONCLUSIONS OF LAW AND OPINION

Permanent Disability

The claim was reopened for the processing of "post-aggravation rights" new/omitted medical conditions ("chronic cervical myofascial pain disorder and

drug rebound headaches”). Such a claim may qualify for payment of permanent disability compensation. ORS 656.278(1)(b); *Goddard v. Liberty Northwest Ins. Corp.*, 193 Or App 238 (2004).

The permanent disability limitation set forth in ORS 656.278(2)(d) applies where there is (1) “additional impairment” to (2) “an injured body part” that has (3) “previously been the basis of a [permanent disability] award.” *Cory L. Nielsen*, 55 Van Natta 3199, 3206 (2003). If those conditions are satisfied, the Director’s standards for rating new and omitted medical conditions related to non-Own Motion claims apply to rate “post-aggravation rights” new or omitted medical condition claims. Under such circumstances, we redetermine the claimant’s permanent disability pursuant to those standards before application of the limitation in ORS 656.278(2)(d). *Jeffrey L. Heintz*, 59 Van Natta 419 (2007); *Nielsen*, 55 Van Natta at 3207-08.

Here, all three factors are satisfied. Dr. Samuels ratified Dr. Denekas’s findings of decreased ROM and a “chronic condition” limitation in claimant’s cervical spine, as well as a Class 2 cranial nerve/brain impairment. These impairment findings qualify for an impairment rating. Moreover, claimant’s “post-aggravation rights” new/omitted medical conditions (“chronic cervical myofascial pain disorder and drug rebound headaches”) involved the same “injured body part” (cervical spine and cranial nerve/brain) that was the basis of his previous permanent disability award.

Therefore, the limitation in ORS 656.278(2)(d) applies to claimant’s permanent disability. However, before application of the statutory limitation, we redetermine claimant’s permanent disability pursuant to the Director’s standards. *See* OAR 436-035-0007(3); *Nielsen*, 55 Van Natta at 3207.

Claimant’s claim was closed by an August 22, 2014 Own Motion Notice of Closure. Thus, the applicable standards are found in WCD Admin. Order 12-061 (eff. January 1, 2013). *See* OAR 436-035-0003(1).

For the purpose of rating claimant’s permanent impairment, only the opinions of his attending physician at the time of claim closure, or any findings with which he or she concurred, and a medical arbiter’s findings may be considered. *See* ORS 656.245(2)(b)(C); ORS 656.268(7); *Tektronix, Inc. v. Watson*, 132 Or App 483 (1995); *Koitzsch v. Liberty Northwest Ins. Corp.*, 125 Or App 666 (1994).

Here, no medical arbiter examination was performed. Consequently, we rely on the reports of Dr. Denekas, as ratified and supplemented by Dr. Samuels, claimant's attending physician, to rate permanent impairment. *See Jennifer L. Williams*, 63 Van Natta 638 (2011).

Dr. Denekas found the following cervical ROM: 20 degrees flexion; 20 degrees extension; 20 degrees right lateral flexion; 20 degrees left lateral flexion; 34 degrees right rotation; and 28 degrees left rotation. These findings, which were ratified by Dr. Samuels, receive in the following cervical ROM impairment values: 4 percent for flexion; 4.4 percent for extension; 1.67 percent for right lateral flexion; 1.67 percent for left lateral flexion; 2.6 percent for right rotation; and 3.2 percent for left rotation. OAR 436-035-0360(2), (3), (4), (5). These values are added for a total cervical ROM impairment value of 17.54 percent, which is rounded to 18 percent. OAR 436-035-0011(2), (4); OAR 436-035-0360(11).

Dr. Denekas apportioned 40 percent of claimant's cervical ROM findings to preexisting cervical degenerative disc disease/spondylosis, and the remaining 60 percent to the accepted conditions. (Ex. 215-26). Dr. Samuels concurred with this apportionment opinion. (Exs. 231, 245). Claimant argues that his cervical ROM impairment value should not be apportioned because his cervical degenerative disc disease is not a legally cognizable "preexisting condition." Specifically, he asserts that Dr. Denekas's statement that his cervical degenerative disc disease constituted an arthritic condition was conclusory. However, when asked whether claimant's preexisting cervical degenerative disc disease was "arthritis or arthritic condition," Dr. Denekas was informed:

"* * * [A]rthritis is defined as: the inflammation of one or more joints due to infections, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change. Arthritic conditions must be established by evidence of inflammation of a joint or joints affected by the arthritis condition."
(Ex. 238-1).

This definition describes "arthritis and arthritic condition" as set forth in *Schleiss v. SAIF*, 354 Or 637, 652-53 (2014), and *Hopkins v. SAIF*, 349 Or 348, 363-64 (2010). Dr. Denekas agreed that claimant's preexisting degenerative disc disease met the criteria set forth for an arthritic condition. (*Id.*) Moreover, in apportioning claimant's cervical ROM findings, Dr. Denekas stated that claimant's

preexisting condition was the “significant changes identified at two levels in the imaging studies in the medical record.” (Ex. 215-26). He had also previously noted that claimant had changes identified in an MRI at C5-6 and C6-7. (Ex. 215-12).

Thus, Dr. Denekas’s reasoning, as ratified by Dr. Samuels, establishes that claimant’s preexisting cervical degenerative disc disease constitutes “arthritis or arthritic condition,” which is a legally cognizable preexisting condition under ORS 656.005(24)(a)(A). (Exs. 238-1, 245). In *Schleiss*, the court held that in order “to qualify for the apportionment of impairment, a cause must be legally cognizable.” 354 Or at 655. There, because that apportionment requirement was not satisfied, all of the claimant’s impairment was “due to” the compensable injury for purposes of making a permanent disability award. *Id.*

Here, in contrast to *Schleiss*, there is a legally cognizable preexisting condition; therefore, we find that apportionment is appropriate.⁴ Consequently, we apportion 60 percent of the 18 percent cervical ROM impairment value, which results in a cervical ROM impairment value of 10.8 percent, which is rounded to 11 percent. OAR 436-035-0011(4); OAR 436-035-0013(1).

Dr. Samuels concurred with Dr. Denekas’s finding that claimant was significantly limited in the repetitive use of his cervical spine due to the accepted conditions. (Exs. 215-26, 231). Therefore, claimant is entitled to a cervical “chronic condition” impairment value of 5 percent. OAR 436-035-0019(1)(e).

We combine claimant’s 11 percent ROM impairment value with his 5 percent “chronic condition” impairment value in the cervical spine, which results in a 15 percent impairment value for the cervical spine. OAR 436-035-0011(6); OAR 436-035-0019(2).

Finally, Dr. Samuels concurred with Dr. Denekas’s finding of a Class 2 cranial nerve/brain impairment. (Exs. 238-2, 245). Therefore, claimant is entitled to a 30 percent impairment value for his cranial nerve/brain. OAR 436-035-0390(10).

⁴ Claimant also cites *Joseph Wagner*, 66 Van Natta 485 (2014), to support his contention that spondylosis “as a matter of law has been determined not to equate to a legally cognizable condition.” However, in *Wagner*, we explained that the claimant’s lumbar spondylosis in that particular case was not a legally cognizable preexisting condition because there was no medical evidence in that record that the claimant had previously been diagnosed with lumbar spondylosis or received treatment for symptoms of such a condition, and because the record did not establish the presence of “arthritis or an arthritic condition.” 66 Van Natta at 486. Therefore, *Wagner* is inapposite.

There are no other ratable permanent impairment findings. We combine the ratable impairment as follows: 30 percent (cranial nerve/brain) combined with 15 percent (cervical spine) results in a 41 percent whole person impairment value. OAR 436-035-0011(6).

As discussed above, the limitation in ORS 656.278(2)(d) applies. Therefore, claimant is entitled to additional permanent disability only to the extent that the permanent disability rating exceeds that rated by prior awards. ORS 656.278(2)(d); *Nielsen*, 55 Van Natta at 3208. In this instance, claimant's prior 13 percent whole person impairment award is less than his current 41 percent whole person impairment, which leaves a remainder of 28 percent. Because the August 22, 2014 Notice of Closure awarded an additional 28 percent whole person impairment, claimant is not entitled to additional whole person impairment. (Ex. 251). Consequently, we affirm the Notice of Closure's whole person impairment award.⁵

We turn to the issue of work disability. The parties do not dispute that claimant is entitled to a work disability award. ORS 656.214(2) (Or Laws 2005, ch 653, § § 3, 5); ORS 656.726(4)(f)(E) (Or Laws 2005, ch 653, § § 1, 5). The parties also acknowledge that claimant's age/education factor is 4. (Ex. 251-2).

We now determine claimant's adaptability factor. The parties agree that claimant's Base Functional Capacity (BFC) is "Heavy." OAR 436-035-0012(8)(a), (j). "Residual Functional Capacity" (RFC) is established by the attending physician's release, unless a preponderance of evidence describes a different RFC. OAR 436-035-0012(10)(a).

Claimant argues that his RFC should be based on Dr. Samuels's September 2014 report. (*See* Ex. 258). The insurer responds that Dr. Samuels's September 2014 report is conclusory, and that claimant's RFC should be based on Dr. Denekas's July 2014 report, with which Dr. Samuels had concurred. (*See* Exs. 238, 245). We find Dr. Samuels's September 2014 report to be more specific than Dr. Denekas's report.

⁵ Claimant's total whole person impairment award to date is 41 percent for his cervical spine and cranial nerve/brain.

Dr. Samuels opined that claimant could occasionally lift up to 20 pounds, and frequently lift up to 10 pounds. (Ex. 258-3). He also indicated that claimant could occasionally climb, and could not crawl. (*Id.*) Because claimant can perform the full range of “Light” activities, but also has “restrictions,” we find that his RFC is “Sedentary/Light.” OAR 436-035-0012(8)(b), (e), (f), (l).

Comparing claimant’s BFC of “Heavy” with his RFC of “Sedentary/Light,” he would be entitled to an adaptability value of 6. OAR 436-035-0012(11). Under the adaptability scale, claimant’s 41 percent whole person impairment value results in an adaptability value of 5. OAR 436-035-0012(13). Thus, the higher value of 6 will be used. *Id.*

Claimant’s age/educational value of 4 times the adaptability value of 6 equals a social-vocational value of 24. OAR 436-035-0012(15)(e). We add the 41 percent whole person impairment value to the 24 percent social-vocational value of 24, which results in a 65 percent “work disability” award. OAR 436-035-0009(6)(b).

As discussed above, the limitation in ORS 656.278(2)(d) applies. Therefore, claimant is entitled to additional permanent disability only to the extent that the permanent disability rating exceeds that rated by prior awards. ORS 656.278(2)(d); *Nielsen*, 55 Van Natta at 3208. In this instance, claimant has not received a prior “work disability” award. The August 22, 2014 Notice of Closure awarded 61 percent “work disability”, *i.e.*, the 41 percent whole person impairment value plus 20 percent social-vocational value, which leaves a remainder of 4 percent. (Ex. 251). Therefore, we modify the Notice of Closure to award an additional 4 percent “work disability.”⁶

Because our decision results in increased permanent disability, claimant’s counsel is awarded an “out-of-compensation” attorney fee equal to 25 percent of the increased permanent disability compensation created by this order (the 4 percent work disability award granted by this order), not to exceed \$4,600, payable directly to claimant’s counsel. ORS 656.386(4); OAR 438-015-0040(1); OAR 438-015-0080(3).

⁶ Claimant’s total award to date is 41 percent whole person impairment for his cervical spine and cranial nerve/brain, and 65 percent work disability.

Temporary Disability

Claimant seeks temporary disability benefits from February 16, 2012 through April 7, 2014, the date his conditions became medically stationary.⁷ Based on the following reasoning, we award additional temporary disability benefits.

Claimant has the burden of proving the nature and extent of his disability. ORS 656.266(1). There are several requirements for the payment of temporary disability benefits for a claim reopened under ORS 656.278(1)(b). First, the claimant must require (including a physician's recommendation for) hospitalization, inpatient or outpatient surgery, or other curative treatment (treatment that relates to or is used in the cure of disease, tends to heal, restore to health, or to bring about recovery). Second, temporary disability benefits are payable from the date the attending physician authorizes temporary disability related to the hospitalization, surgery, or other curative treatment, which may be the date the requisite treatment is recommended, until the worker's conditions become medically stationary. Third, temporary disability benefits are payable under ORS 656.210, ORS 656.212(2), and ORS 656.262(4). *Butcher v. SAIF*, 247 Or App 684, 689 (2012); *James M. Kleffner*, 57 Van Natta 2071 (2005); *David L. Hernandez*, 56 Van Natta 2441 (2004).

In *Lederer v. Viking Freight, Inc.*, 193 Or App 226, *recons*, 195 Or App 94 (2004), the court held that ORS 656.262(4)(a) obligates the payment of temporary disability benefits when an objectively reasonable carrier would understand contemporaneous medical reports to signify an attending physician's contemporaneous approval excusing an injured worker from work. Because ORS 656.262(4) applies when determining eligibility for temporary disability benefits for claims in Own Motion status, *Lederer* has applicability for determining the adequacy of time loss authorization from an attending physician under ORS 656.278(1)(b). *Hernandez*, 56 Van Natta at 2448. Additionally, because this is an Own Motion claim, the temporary disability authorization must be "for the hospitalization, surgery or other curative treatment." ORS 656.278(1)(b).

⁷ The August 22, 2014 Own Motion Notice of Closure listed the medically stationary date as "April 8, 2014." (Ex. 251-1). However, the parties do not dispute that claimant's compensable conditions were medically stationary as of April 7, 2014, the date that Dr. Samuels declared his conditions to be medically stationary. (Ex. 214). Therefore, we modify the August 2014 Notice of Closure to list "April 7, 2014" as the medically stationary date.

Further, the question of whether treatment constitutes “curative treatment” presents a medical question that must be addressed by medical evidence. *James P. Larson*, 57 Van Natta 2625 (2005).

Finally, temporary disability compensation is not payable “for periods of time during which the claimant did not qualify as a ‘worker’ pursuant to ORS 656.005(30).”⁸ ORS 656.278(2)(b); *Henry D. Desamais*, 64 Van Natta 652 (2012); *Robert Dubray*, 57 Van Natta 2035, *recons*, 57 Van Natta 2279 (2005).

Here, on May 8, 2014, as reconsidered on June 3, 2014, we issued an Own Motion Order addressing claimant’s entitlement to temporary disability benefits regarding his reopened “post-aggravation rights” new/omitted medical condition claim (“chronic cervical myofascial pain disorder”). *See Clark*, 66 Van Natta at 825-29, *recons*, 66 Van Natta at 1039-40. Applying the above law regarding entitlement to such benefits, we found that this reopened “post-aggravation rights” new/omitted medical condition claim required curative treatment. We also found that Dr. Samuels’s opinions relied on by claimant were sufficient to authorize temporary disability benefits for curative treatment from June 20, 2011 through February 15, 2012. Specifically, we noted that, on June 20, 2011, Dr. Samuels released claimant to modified work for his neck pain and headache. On August 15, 2011, he released claimant from work for his neck pain and headache. Both releases indicated that claimant’s condition was not medically stationary, but anticipated that this would occur within “3-6 months.” (Exs. 9-1, 33-1).

Based on these limitations, we found that Dr. Samuels’s temporary disability authorizations were not “ongoing” or “open-ended.” In addition, we found that he provided no subsequent authorization for temporary disability benefits.⁹ We also concluded that claimant was in the workforce at the time of disability. Based on this reasoning, we awarded claimant temporary disability benefits from June 20,

⁸ ORS 656.005(30) defines “worker” and provides, in relevant part:

“‘Worker’ means any person * * * who engages to furnish services for a remuneration, subject to the direction and control of an employer * * *. For the purpose of determining entitlement to temporary disability benefits or permanent total disability benefits under this chapter, ‘worker’ does not include a person who has withdrawn from the workforce during the period for which such benefits are sought.”

⁹ In this regard, Dr. Samuels’s March 20, 2013 agreement that claimant’s treatment was “curative” did not authorize temporary disability benefits (retroactively or otherwise).

2011 through February 15, 2012 on his reopened “post-aggravation rights” new/omitted medical condition claim (“chronic cervical myofascial pain disorder”). *Id.*

Because that decision has become final, the insurer contends that it has a preclusive effect on claimant’s current request for temporary disability benefits. Based on the following reasoning, we find that issue preclusion applies to claimant’s argument for additional temporary disability benefits for the “post-aggravation rights” new/omitted medical condition claim for “chronic cervical myofascial pain disorder,” but not for the “post-aggravation rights” new/omitted medical condition claim for “drug rebound headaches.”

Under the doctrine of issue preclusion, a former adjudication “precludes future litigation on a subject issue only if the issue was ‘actually litigated and determined’ in a setting where ‘its determination was essential to’ the final decision reached.” *Drews v. EBI Cos.*, 310 Or 134, 139 (1990) (quoting *North Clackamas School Dist. v. White*, 305 Or 48, 53, *modified*, 305 Or 468 (1988)). This is to be distinguished from the doctrine of claim preclusion; when a claimant’s temporary disability is only one part of an ongoing claim, it is not final for claim preclusion purposes until the claim is closed. *Drews*, 310 Or at 146; *Steven R. Holmes*, 59 Van Natta 1989, 1990-91 (2007); *Bradley K. Stevens*, 56 Van Natta 110, 111 (2004).

There are five requirements that must be met for issue preclusion to apply: (1) the issue in the two proceedings must be identical; (2) the issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard; (4) the party sought to be precluded was a party or was in privity with a party in the prior proceeding; and (5) the prior proceeding was the type of proceeding to which a court will give preclusive effect. *Nelson v. Emerald People’s Util. Dist.*, 318 Or 99, 104 (1993).

As explained above, our prior May 8, 2014 decision, as reconsidered on June 3, 2014, determined claimant’s entitlement to temporary disability benefits as of that time regarding the reopened “post-aggravation rights” new/omitted medical condition claim for the “chronic cervical myofascial pain disorder.” The requirements for temporary disability benefits (as listed above) are identical, whether those benefits concern Own Motion claims in open status (“procedural” temporary disability benefits) or closed status (“substantive” temporary disability benefits). See ORS 656.278(1)(a), (1)(b); *Clark*, 66 Van Natta at 825-26.

Therefore, we find that the issue in the prior proceeding and the current proceeding was identical regarding claimant's entitlement to temporary disability for the "post-aggravation rights" new/omitted medical condition claim for the "chronic cervical myofascial pain disorder" as of May 8, 2014 (the date of our previous order).¹⁰

In addition, that issue was actually litigated and essential to a final decision on the merits in the prior proceeding. Further, claimant had a full and fair opportunity to be heard and was a party in the prior proceeding, which was the type of proceeding to which a court will give preclusive effect. Therefore, we conclude that claimant is precluded from re-arguing his entitlement to additional temporary disability benefits for the "post-aggravation rights" new/omitted medical condition claim for "chronic cervical myofascial pain disorder."

On the other hand, at the time of our prior order, although the insurer had accepted a "post-aggravation rights" new/omitted medical condition for "drug rebound headaches," it had not yet reopened the Own Motion claim for that particular condition. *See Clark*, 66 Van Natta at 825. After our prior decision, on June 4, 2014, the insurer voluntarily reopened claimant's Own Motion claim for the "post-aggravation rights" new/omitted medical condition ("drug rebound headaches").

The August 22, 2014 Own Motion Notice of Closure closed both reopened "post-aggravation rights" new/omitted medical condition claims ("chronic cervical myofascial pain disorder" and "drug rebound headaches"). (Ex. 251-1). The issue currently before us is claimant's appeal of that August 2014 closure notice, which first addressed temporary disability benefits for the new/omitted medical condition of "drug rebound headaches." Because our prior decision did not litigate entitlement to temporary disability benefits for that subsequently reopened new/omitted medical condition, issue preclusion does not apply to the "post-aggravation rights" new/omitted medical condition for "drug rebound headaches." Claim preclusion also does not apply. *Drews*, 310 Or at 146; *Holmes*, 59 Van Natta at 1990-91; *Stevens*, 56 Van Natta at 111. Therefore, we proceed to address entitlement to temporary disability benefits for the "drug rebound headaches" condition.

¹⁰ As addressed below, this record includes Dr. Samuels's May 2014 time loss authorization, which purports to retroactively authorize temporary disability effective February 15, 2012. (Exs. 218, 223). Yet, because such an authorization is effective only for the 14 days preceding the authorization and because the record establishes that claimant's compensable conditions were medically stationary on April 7, 2014, Dr. Samuels's authorization does not entitle claimant to additional temporary disability benefits for his "chronic cervical myofascial pain disorder" condition. ORS 656.262(4)(g); ORS 656.278(1)(a), (1)(b).

On March 28, 2012, Dr. Samuels opined that claimant had chronic headaches from his head injury years ago, with superimposed “analgesic rebound.” (Ex. 96-1). He also stated that claimant was disabled from working “in the woods and we reassess that status every 3-6 months.” (*Id.*) On May 9, 2012, Dr. Samuels repeated that claimant was disabled from working “in the woods and we reassess that status every 3-6 months.” (Ex. 100-1).

Based on these limitations, we find that Dr. Samuels’s temporary disability authorizations were not “ongoing” or “open-ended.” See *Farrell E. Allen*, 59 Van Natta 2788, 2791 (2007) (authorization that specified no work until a certain event (“recheck”) was not “ongoing” authorization); compare *Charlene Y. Pearce*, 55 Van Natta 728, 730 (2003) (physician’s authorization was “open-ended” because it was not limited to a specific period, or until the occurrence of a specific event). Thus, claimant would be entitled to temporary disability benefits from March 28, 2012 through November 9, 2012 (six months from the May 9, 2012 authorization), provided that the remaining statutory requirements, as summarized above, are satisfied.

Based on our reasoning in our prior orders, we find that claimant was in the workforce at the time of disability and that he required curative treatment. Furthermore, based on Dr. Samuels’s March and May 2012 authorizations as summarized above, temporary disability benefits were authorized for such curative treatment.

However, in June and July 2012, Dr. Samuels reasoned that claimant’s headaches did not include an element of “analgesic rebound.” He explained that, although that previously appeared to be the case, claimant’s headaches had continued after the medicine with which they were concerned was discontinued. On that basis, Dr. Samuels opined that medications were not the cause of claimant’s headache and neck pain. (Exs. 104-1, 111, 112-1). Specifically, as of July 16, 2012, he concluded: “It is completely clear to me that medications, whether their use be appropriate or excessive, are not the cause of [claimant’s] headache and neck pain.”¹¹ (Ex. 111). Dr. Samuels’s opinion is un rebutted.

Thus, by July 16, 2012, Dr. Samuels found that claimant did not have “drug rebound headaches.” Therefore, his authorization for temporary disability benefits for that condition did not extend beyond that date. Consequently, claimant is

¹¹ On July 18, 2012, Dr. Samuels repeated that claimant “clearly does not have analgesic rebound headaches.” (Ex. 112-1).

entitled to temporary disability benefits for the “post-aggravation rights” new/omitted medical condition (“drug rebound headaches”) from March 28, 2012 through July 16, 2012, when Dr. Samuels concluded that claimant did not have that condition.

Claimant relies on Dr. Samuels’s June 20, and August 15, 2011 827 forms, his March 20, 2013 response, his May 7, 2014 response, and his May 21, 2014 supplemental report. (Exs. 9, 33, 145, 218, 223).¹² He contends that these exhibits establish entitlement to additional temporary disability benefits from February 16, 2012 through April 7, 2014. Based on the following reasoning, we disagree.

On June 20, 2011, Dr. Samuels released claimant to modified work for his neck pain and headache. (Ex. 9). On August 15, 2011, he released claimant from work for his neck pain and headache. (Ex. 33). Both releases indicated that claimant’s condition was not medically stationary, but anticipated that this would occur within “3-6 months.” (Exs. 9-1, 33-1).

We addressed these June 20, and August 15, 2011 work releases in our prior order. We continue to find that, based on these limitations, Dr. Samuels’s temporary disability authorizations were not “ongoing” or “open-ended.” *See Clark*, 66 Van Natta at 827-28; *Allen*, 59 Van Natta at 2791 (authorization that specified no work until a certain event (“recheck”) was not “ongoing” authorization). Furthermore, Dr. Samuel’s March 20, 2013 agreement that claimant’s treatment was “curative” did not authorize temporary disability benefits. (Ex. 145). Thus, based on these exhibits, claimant would be entitled to temporary disability benefits from June 20, 2011 through February 15, 2012 (six months from the August 15, 2011 authorization).

Claimant also relies on additional reports from Dr. Samuels. (Exs. 218, 223). On May 7, 2014, Dr. Samuels responded to questions regarding the effect of claimant’s diagnoses including “Chronic Cervical and Myofascial Pain Disorder, migraine headaches, and sensitivity to light and sound,” as well as chronic neck and head pain, on his ability to sustain regular employment.¹³

¹² Claimant submitted copies of these exhibits with his argument, numbering Exhibit 218 and 223 as Exhibit 217A and 222A, respectively. However, because those exhibits were already in the record submitted by the insurer, we refer to those exhibits as originally numbered; *i.e.*, Exhibit 218 and 223.

¹³ Thus, Dr. Samuels’s May 7, 2014 report addresses the effect of conditions that are not part of the accepted conditions in this claim; *e.g.*, migraine headaches and sensitivity to light and sound. Nevertheless, assuming without deciding that this report represents authorization for temporary disability regarding the “post-aggravation rights” new/omitted medical conditions, based on the following reasons, it does not result in an increased temporary disability award.

(Ex. 218-1). Dr. Samuels indicated that claimant was “capable of < 6 hrs/wk,” he may not be able to return to work, and he was not able to perform any “tree/forestry/logging work.” (Ex. 218-1, -2).

In addition, on May 21, 2014, Dr. Samuels agreed that, when he completed the August 15, 2011 827 Form, his authorization for temporary disability continued until April 7, 2014. (Ex. 223-1). He also agreed that claimant was restricted from work either in total or as modified from February 15, 2012 to April 7, 2014. (Ex. 223-2). Claimant contends that these statements are clarifications of Dr. Samuels’s earlier statements and should not be characterized as retroactive authorization of temporary disability.

As addressed above, issue preclusion prevents claimant from arguing entitlement to additional temporary disability benefits for the “post-aggravation rights” new/omitted medical condition claim for “chronic cervical myofascial pain disorder.” Furthermore, based on Dr. Samuels’s unrebutted opinion, as of July 16, 2012, claimant did not have “drug rebound headaches.” Therefore, any subsequent authorization for temporary disability benefits would not be for the condition of “drug rebound headaches,” which is the only condition currently before us regarding entitlement to such benefits. Accordingly, claimant is not entitled to additional temporary disability benefits based on Dr. Samuels’s work releases after July 16, 2012.

Nevertheless, even if we considered these May 2014 reports from Dr. Samuels, the result would not change. We reason as follows.

In *Lederer*, 193 Or App at 237, the court held that temporary disability “authorization connotes an attending physician’s *contemporaneous* approval excusing an injured worker from work. When an objectively reasonable insurer or self-insured employer would understand *contemporaneous* medical reports to signify such approval, temporary disability benefits are authorized, obligating the insurer or self-insured employer to pay such benefits.” (Emphases added).

Dr. Samuels’s May 2014 reports do not represent *contemporaneous* approval excusing claimant from work, nor are they *contemporaneous* medical reports signifying such approval. Instead, those reports *retroactively* authorize temporary disability benefits. Such authorization is only retroactively effective for 14 days. *See* ORS 656.262(4)(g); *Menasha Corp. v. Crawford*, 332 Or 404, 416 (2001) (ORS 656.262(4)(g) establishes that the legislature did not intend to permit physicians to certify retroactive temporary disability compensation for a period

greater than 14 days); *James D. Chandler*, 57 Van Natta 966, 969 (2005) (an attending physician's retroactive authorization for temporary disability benefits is not effective for more than 14 days prior to its issuance). Thus, pursuant to the May 7, 2014 authorization, claimant would be entitled to temporary disability beginning April 23, 2014, which is *after* his conditions became medically stationary on April 7, 2014. However, claimant is not entitled to temporary disability benefits after his conditions become medically stationary. ORS 656.278(1)(a), (1)(b); *Judy L. Frazier*, 56 Van Natta 3270, *recons*, 56 Van Natta 3430, 3432 (2004) (no temporary disability benefits were due after the claimant's condition became medically stationary, which occurred well before the 14-day limit on the retroactive temporary disability authorization under ORS 656.262(4)(g)); *Catherine A. Skinner*, 55 Van Natta 3766 (2003).

Accordingly, claimant is entitled to temporary disability benefits from June 20, 2011 through February 15, 2012 and from March 28, 2012 through July 16, 2012. The August 22, 2014 Notice of Closure awarded temporary disability benefits from June 20, 2011 through February 25, 2012.¹⁴ (Ex. 251-1). We modify the Notice of Closure to award temporary disability benefits from June 20, 2011 through February 15, 2012 and from March 28, 2012 through July 16, 2012.

Claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of this increased temporary disability award, not to exceed \$1,500, to be paid out of the temporary disability award, payable directly to claimant's counsel. OAR 438-015-0080(1).

IT IS SO ORDERED.

Entered at Salem, Oregon on March 6, 2015

¹⁴ Although the August 2014 Notice of Closure lists the temporary disability award from June 20, 2011 through February 25, 2012, the parties do not dispute that the temporary disability award was from June 20, 2011 through February 15, 2012.